United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1914

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

RUSSELL DICKERSON,

Appellant.

Docket No. 74-1914

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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The Government's answering brief in this case articulates for the first time a theory of prosecution not previously presented at any stage in the proceeding. Without attempting to assess the reason for this currently popular story,* it is apparent that it provides additional grounds for reversal of the judgment.

*See Sibron v. New York, 392 U.S. 40 (1967).

I

A review of the proceedings before the District Court establish that the Government did not in any way rely upon or assert that any assaultive conduct occurred during the course of the larceny. Thus, at the beginning of the trial, the Government sought to introduce the gun into evidence. Defense counsel objected, stating that there was no charge that the assault occurred with a gun. The Government concurred in this, and the District Judge agreed to admit the gun solely as proof that the agent was acting within the course of his duties (37*). The Government never modified its position on this issue. The theory of the prosecution was that the assault occurred after appellant, Young, and Sykes had the weapon and the $500 and Balasz tried to stop appellant from getting into the car. This theory is incorporated in the Government's request to charge in which the prosecutor asked for an instruction stating that appellant participated in a state law larceny under New York Penal Law §155.05. As explained in the main brief, this precludes assault as a joint venture.

At the Government's insistence, this theory was adopted in toto by Judge Brieant. In the colloquy held on what was to be included in the judge's charge to the jury, in which the Assistant United States Attorney fully participated, the Judge stated that he would charge:

> That is that the defendant Dickerson, acting jointly or as partner with Moses Young and Julius Sykes, was engaged in a criminal venture, words used during the trial, to rip off Balasz and Carroll by taking their money for the sale of a gun and ammunition and keeping both the money and the gun.[*] That would be larceny and anybody who does that knowingly and willfully would be engaged in a criminal venture.[**]
>
> * * *
>
> I am trying to define what is contended to be the illegal criminal venture; that they were attempting to rip off Balasz and Carroll by taking their money for the sale of a gun and ammunition and keeping both the money and the gun. That would be larceny.
>
> (191-193).

To these statements by the Judge the prosecutor made no response.

Later in the colloquy, defense counsel objected to a charge on joint venture. Again without any comment by the prosecutor, Judge Brieant repeated his statement on the theory of the case:

> ... but the joint venture can be a joint venture to commit a crime under state law, such as larceny, and if in the course of doing that, say A, B and C are involved in a joint venture to commit larceny, which this would have been by the agent's testimony --
>
> * * *
>
> By the testimony of Balasz, this would have been a state crime of larceny because

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*This was Balasz' testimony.

**The entire colloquy is annexed as "A" to this brief.

they took his money and kept the gun. They agreed to sell him a gun, right, and they showed him the gun, they took the gun back and they began to disappear with both the gun and the money and that would be larceny on their view of the fact. I know you don't concede that, but a jury could find --

* * *

For the purpose of working it. He asked your man for the money back and he wouldn't give him the money and he said, I don't have your money. The witness Balasz testified that in fact Mr. Dickerson did have the money.

Now, I am not passing on the credibility of any of this, you [the defense] understand, but that is their contention and if the jury so finds, the jury may find that Mr. Dickerson and Young and Sykes were party to a scheme to defraud by larceny, by trick, by giving somebody the gun --

* * *

... It is contended even by Dickerson that somebody struck Balasz and it happened to be Young.

Now, if the jury finds that at the time Young struck Balasz, if he did, that Young, Sykes and Dickerson were engaged in a state law criminal conspiracy or joint venture or undertaking to commit larceny against the two hippies, who later turned out to be agents, then the acts of Young in beating on Belasz, if he did, are the acts of Dickerson under principals of agency and that is all there is to it.

(196-198).

Relying on this theory that the larceny, which excludes assaultive behavior, was the joint venture which would create appellant's vicarious liability for the subsequent assault, defense counsel made no attempt to address himself to the idea that assaultive behavior occurred during the larceny and

was a contemplated part of it (see 206).

The theory of the case was so completely premised on the position that there was no assaultive behavior during the larceny that the Judge rejected the alleged elbowing by Sykes as assaultive conduct, without objection by the prosecutor (192). Not only was there no argument by the Government that the elbowing was assaultive conduct, there was no reference by Assistant United States Attorney Clarey to a pointing of the gun by Sykes at Balasz, an argument which the Government now finds so critical here.*

The Assistant United States Attorney, in his summation, went through the evidence presented to support his case (214-219), yet nowhere is there a hint that the Government was urging the behavior now alleged to be in the record. To the contrary, the summation emphasizes that Balasz was of the belief that he could get the gun or the money from appellant or Sykes. This was obviously done for the purpose of showing that there was a joint venture only to get the money and the gun.

As foretold by the colloquy, the charge to the jury mirrored this theory.

Despite the record, the Government now argues that appellant is guilty because assaultive behavior accompanied the

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*Balasz testified that Sykes drew back when Balasz tried to grab the gun from Sykes while Sykes was in the car. This action of drawing back to keep the gun away from Balasz is totally inconsistent with assaultive behavior, but makes perfect sense if the intent was to keep the gun.

larceny so that the jury must have inferred that the agreement to do the larceny included an agreement to commit assaultive behavior. Thus the Government urges that under United States v. Alsondo, 486 F.2d 1341, 1346 (2d Cir. 1974), there was an agreement to commit assaultive behavior which creates liability for the assault charged.

The Government should not be permitted to change its theory on appeal so as to justify the conviction. Since Alsondo requires a finding of a specific agreement to do a specific act (see infra), to permit the Government to change theories would have the impermissible effect of having this Court determine critical factual issues which were never put to the jury, which the jury never considered, and on which the jury was not charged (Weiler v. United States, 323 U.S. 606, 611 (1945); United States v. Diogo, 320 F.2d 898, 909 (2d Cir. 1963); Wilson v. United States, 250 F.2d 312, 325 (9th Cir. 1957)),* and which could easily have been rejected.**

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*The Government goes to extraordinary lengths to draw highly improbable inferences from the facts it claims show assaultive behavior. See Government Brief at 11-12 and fn. at 12. In this argument, the Government has impermissibly delegated to itself the role of factfinder, for the jury never considered the factual question now argued.

**If appellant's testimony is accepted, there was no assaultive behavior contemplated. The Government relies on Belasz' testimony that appellant, Sykes, and Young told Carroll, the other undercover agent, to drive his car away to show intent to make it easier to victimize Balasz. This fanciful argument is refuted by the record. Agent Balasz himself testified that appellant and Young did not want Carroll double parked because he would attract the police. This on its face is a reasonable apprehension, especially since

The Government's shift in its theory is a tacit acknowledgment that it has failed to meet its burden of proof on the theory it steadfastly maintained throughout the trial. As argued in the main brief, this failure to prove the elements of the crime under Alsondo requires reversal. United States v. Diogo, supra.

II

If this Court is willing to permit the Government to change on the appeal its theory of guilt, reversal must be granted because the Judge did not properly instruct the jury as to the elements of guilt under Alsondo. United States v. Clark, 475 F.2d 240 (2d Cir. 1972); United States v. Fields, 469 F.2d 119, 120 (2d Cir. 1972).

In Alsondo, the indictment charged assault and conspiracy to assault. The Government's theory was that the defendants planned to take the undercover agents' money by fraud (selling them sugar rather than drugs) or, if fraud failed, by

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both surveillance agents testified that the street traffic included sanitation trucks and buses. Further, the record does not show that appellant, Sykes, or Young knew that Belasz called Carroll over to put the gun through the window of the car.

The Government also claims that assaultive behavior occurred when Sykes pointed the loaded gun at Belasz and "demanded" $500 (Government Brief at 8). The record is clear that no "demand" was made. Belasz testified that Sykes "said" the price was $500. Sykes was only repeating the deal. The evidence also showed the gun was broken.

force, and the judge charged the jury in that manner, specifically referring to robbery.*

In the charge given in Alsondo, the judge distinguished between a robbery and a larceny, stating that a larceny did not include an assault, and if the agreement was only to com-

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*The trial judge in Alsondo stated:

> An assault is defined as an unlawful attempt or offer through force and violence to do injury to the person of another with such apparent present possibility of carrying out such a threat as to put the person against whom the attempt was made in fear of personal violence. The drawing of a handgun against another person would be an assault. A robbery is the stealing of property or money from a person by the use of threat or physical force, such as a handgun. It includes an assault so that if you find that a purpose of any conspiracy was to rob agents Hall or Lightcap of seventeen thousand dollars in cash, that would constitute an assault and such proof would be sufficient insofar as this particular element of the case is concerned.
>
> A person commits larceny when with the intent to deprive another of his property or to appropriate the same to himself or a third person he wrongfully takes, obtains, or withholds such property from the owner. Larceny does not involve an assault. Therefore, if you find that a conspiracy existed among those defendants or some of them, and the conspiracy's only purpose was to commit a larceny or to commit a fraud upon Agents Hall and Lightcap by selling them sugar, which the agents thought to be heroin, this will not support a finding by you that the defendants are guilty on Count One, if that is all they did.
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> United States v. Alsondo, 2d Cir. Doc. No. 73-1297, Appellant's Appendix at 14a from 72 Cr. 1370 transcript at 514.

mit a larceny there was no assault.*

*On the substantive count, the trial judge in Alsondo charged:

> It's the government's contention as to this conspiracy that its object or purpose was getting away from Agents Hall and Lightcap, the so-called flasshroll, containing seventeen thousand dollars in currency which the government contends the agents had with them at the apartment. And that this money was to be obtained either by fraud, that is by selling them sugar in place of heroin, and by assaulting or in effect robbing them of the money if they became suspicious of the heroin and decided to test it. If you find that such a conspiracy existed, then each member of the conspiracy at the time of the commission of a criminal act by one member thereof done in furtherance of the conspiracy will be criminally liable, together with the co-conspirator who performed the criminal act in question. In this case, assaulting a federal officer.
>
> There is no evidence that the defendant Feola personally assaulted anyone. Accordingly, in connection with the second count, if you do not find the defendant Feola was a member of the conspiracy and guilty in connection with Count One, you may not find him guilty with respect to Count Two. If you find that he was, on August 31, 1972, a member of the conspiracy and further that either Alsondo or Rosa assaulted a federal officer on that day in the course of the conspiracy during its existence and in furtherance of its purposes, and that the one who assaulted was also a member of the conspiracy, then you should find Feola guilty of the substantive charge in this Count Two, under the agency theory arising out of a conspiracy, which I previously mentioned to you, pursuant to which every member of a partnership in crime is the agent for the other members as to criminal acts committed during the existence of and in furtherance of the purposes for which the conspiracy was organized.
>
> United States v. Alsondo, 2d Cir. Doc. No. 73-1297, Appellant's Appendix at 21a from 72 Cr. 1340 transcript at 520-521. Emphasis added.

Thus, the charge instructed the jurors that if they found that the agreement included the use of force, then the actual use of force by a co-conspirator in the course of the conspiracy to further the conspiracy would create vicarious liability for another conspirator.*

This Court reversed the conviction on the conspiracy because the judge failed to charge that knowledge of the agents' identity was an element of the conspiracy. The Government, in its petition for rehearing, argued that the substantive conviction should be sustained under the agency theory of Pinkerton because there was a conspiracy to get the money by fraud or force, and that Pinkerton applied even if the conspiracy which created liability for the substantive crime could not be charged in the indictment because it was a state crime.

The opinion of this Court accepted only part of this argument, specifically rejecting the applicability of Pinkerton. This Court found that the jury's finding of an assault necessarily meant that it found a conspiracy to commit a robbery since the latter was the Government's theory of the case. Thus, the Court continued, the jury found a specific agreement to commit the very assaultive act which was committed, and everyone who agreed to it was substantively liable for the assault

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*The footnote at 9 of the Government's brief makes a feeble attempt to state that the charge in Alsondo and in this case were alike. Obviously, this is not true.

committed. This theory of liability was the very theory the district judge charged in Alsondo.

This Court found a distinction between the agency theory in Alsondo and the agency theory under Pinkerton. The distinction is that while in both cases the behavior giving rise to the charges for the substantive crime must occur during the conspiracy and be performed in furtherance of it by a conspirator, in Alsondo the specific act charged must be the subject of the agreement, while under Pinkerton it must be foreseeable from the circumstances of the agreement.

In this case, the Judge did not charge that under Alsondo the assault had to be specifically agreed upon. By charging larceny, Judge Brieant in effect told the jurors they did not have to make a finding on that issue. Thus, the Alsondo charge was improper and denied appellant a jury verdict on all the elements of the crime.

The Government relies alternatively on Pinkerton to sustain the judgment here. However, Pinkerton was not charged to the jury, and properly so, because it is not applicable to this case. Under Pinkerton, substantive liability is premised on the existence of a conspiracy. The Government's argument is that this conspiracy need not be one subject to Federal jurisdiction. This argument was rejected in Alsondo. The violation of the Federal conspiracy statute (18 U.S.C. §371) in Pinkerton included the mental and physical elements to provide a connection between the accused and the Federal

crime. It is this connection between the Federal penal law and the defendant which permits the Federal Government to prosecute a person for an act he did not participate in or know about.* Without this connection to the Federal authority, there can be no conviction for the act even if it constitutes some crime. Screws v. United States, 325 U.S. 91, 109 (1945); United States v. Fox, 95 U.S. 670, 672 (1871); United States v. Archer, 486 F.2d 670 (2d Cir. 1973); semble United States v. Leary, 395 U.S. 6, 37 et seq. (1969).**

III

The answers to the Government's arguments on the failure

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*Cases cited by the Government go to issues different from that raised here and are irrelevant to the issue before this Court. In United States v. Bynum, 485 F.2d 40 (2d Cir. 1973), vacated on other grounds, ___ U.S. ___ (1974), the court permitted introduction of evidence of state crimes to show the scope of a Federal conspiracy. No question of liability was involved. In United States v. Etheridge, 424 F.2d 951, 964-965 (6th Cir.), cert. denied, 400 U.S. 993 (1971), there were two violations of Federal law involved, and the question was whether they were separate conspiracies so as to permit the conclusion that one of the defendants had withdrawn.

**It is this constitutional principle which requires a Federal element, either explicitly or by Congressional finding of national interst, in order that the Federal Government can legislate at all. Even where there is a Federal nexus in Federal penal legislation, the courts will construe the application of the statute as narrowly as possible. United States v. Maze, 414 U.S. 395 (1974); Rewis v. United States, 401 U.S. 808 (1971). Here, where the liability of an individual under a statute is premised on a judicially created theory, the courts can do no less than to require proof of the same constitutionally mandated nexus. See United States v. Bass, 404 U.S. 336, 349 (1971).

to take exception to the instruction are myriad. First, counsel did object to any instruction which included reference to a conspiracy to commit larceny, on the ground that such a charge was not included in the indictment. The Judge rejected this objection.

Second, if Pinkerton was not charged,* counsel cannot be held to the burden of objecting to a charge not given and inappropriate under Alsondo. See United States v. Diogo, supra, 320 F.2d at 909, n.10.

Third, if Pinkerton was charged, it was an unconstitutional theory of guilt and should not have been charged as the sole or alternative basis for finding guilt. Leary v. United States, supra, 315 U.S. at 31-32; United States v. Rodriguez, 465 F.2d 5, 10 (2d Cir. 1972).

Fourth, the omission of the element of foreseeability was, on this record, substantial error, since on the testimony presented by the defense it was the sole link between appellant and the crime.** United States v. Fields, supra; United States v. Clark, supra.

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*In its Request to Charge #13, the Government labels the vicarious liability charge a "Pinkerton" charge, but Judge Brieant, by referring to a recently decided Second Circuit case (199) obviously meant this to be an Alsondo charge, and indeed the word "Alsondo" is handwritten in on the bottom of the request to charge.

**Even this, however, does not provide the Federal nexus.

The Government also claims a failure to object to an improper Alsondo charge requires affirmance. However, since the nature of the agreement is one of three critical elements to establish guilt under Alsondo, this is substantial error requiring reversal. United States v. Clark, supra; United States v. Fields, supra.*

CONCLUSION

For the above-stated reasons, the judgment should be reversed and the indictment dismissed or a new trial granted.

Respectfully submitted,

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*One cannot help but note that neither the Government's request to charge nor the Judge (who also sat in Alsondo) recognized the difference between the Alsondo and Pinkerton charge.

COLLOQUY

AFTERNOON SESSION

1:50 P.M.

(In the robing room)

THE COURT: May we go on the record. Do you have any requests, Mr. Works?

MR. WORKS: No, I don't, your Honor.

THE COURT: I would outline to you briefly what I propose to instruct the jury as I presently view the case.

I, of course, have the right to comment and duty to comment on anything which might come up in the summation of which I am not presently aware, so I don't foreclose myself. After I finish doing that, I will answer any questions or listen to any requests you may have. You are not required to take any exceptions at this time unless you wish to do so.

I begin, of course, by advising the jury of their function, of the fact that the parties are equal, what my function is; that anything that I might say about evidence is not to be substituted for their own recollection; that the attorneys have their rights with respect to objections and the like.

The neutrality of the Court. The fact that the indictment is no evidence. And the burden of proof and the presumption of innocence. These are all so relatively standard that I don't think I need burden you with them unless you care to have them read in part.

I will then define reasonable doubt.

I inform them that guilt is personal, but in determining guilt they may have to consider the nature of the participation, if any, of Moses Young and Julius Sykes.

Then I am taking requests numbers 1 and 2 of the government and 3 and 4. I would then advise the jury that the government contends that Mr. Dickerson punched Balasz in the arm with his fist causing a bruise and that Dickerson and Moses Young, acting together, nad Balasz up against the car and they were forcibly striking him shaking his body and throwing his body against the car and the sum total of Dickerson's action coupled with those of Moses Young had the effect of intimidating Balasz and placing him in here particularly when his gun fell to the ground while he was drawing it out to protect himself as he claims he was.

I will tell them that the defendant says he never struck Balasz. The scuffle was between Young and

Balasz and not between himself and the complainant Balasz.

I would then define knowledge and willfullness and tell them how they determine knowledge and intent by inference from all the surrounding circumstances.

I am then taking number 6 of the government's requests, which I have modified slightly. In the third line I am adding "If there was one" after the word assault. I am using the term special agent rather than an agent and I have stricken out the part about there seems to be little dispute on this point because Mr. Works has refused to concede that on the record and I think it would be inappropriate for me to include that sentence that is in the request.

I am adding to the following sentence by saying: "The contradicted testimony is that Balasz at the time of the incident was acting in an undercover capacity with respect to narcotics and machine guns.

I say if you so find that element of the crime has been satisfied.

Then I will repeat my limiting instruction previously given about the evidence relating to possible information about narcotics and dealings in guns; that that is not what he is on trial here for. The evidence was permitted merely to allow them to determine whether

Balasz was acting at that time in his official capacity and also so they could properly understand the facts concerning the alleged conduct on July 27 and for those purposes only and if they have any prejudice or personal feelings or bias about guns or narcotics, they are to put it out of their mind.

I am then taking number 5 and I then wish to take up the matter of my ruling about whether he was permitted to say he didn't know and I made this ruling before he testified that he never struck Balasz. When I received the evidence I believed he might testify that he did strike the special agent, but that he did so by mistake not knowing he was an agent and believing he was entitled to defend himself against a person he regarded merely as a hippy.

Since the contention of self-defense was not made, but rather Mr. Dickerson says he never hit or intimidated the agent, it is now of no concern whatever to the jury whether the defendant knew at the time that Balasz was a federal officer or did not know.

I was then taking number 13. At the end of the first paragraph in 13 I have added the following: That is that the defendant Dickerson, acting jointly or as partner with Moses Young and Julius Sykes, was engaged

in a criminal venture, words used during the trial, to rip off Balasz and Carroll by taking their money for the sale of a gun and ammunition and keeping both the money and the gun. That would be larceny and anybody who does that knowingly and willfully would be engaged in a criminal venture.

I took out Sykes at the bottom of the first page of request number 13 because there is no evidence pertaining to Sykes having committed the assault. Am I correct in that?

MR. CAREY: Your Honor, the government agent Balasz testified that when he reached to take the gun from Sykes, while he was seated in the front passenger seat of the Chevrolet that Sykes drew back keeping the gun away from him and at the same time elbowed Agent Balasz.

THE COURT: Don't you think that is awful thin with all the evidence that is in this case?

MR. CAREY: I just wanted to clarify the testimony, your Honor.

THE COURT: I think it is not necessary for me to refer to Sykes.

MR. WORKS: Your Honor, I did not follow that point, as you modified request number 13. You

indicated --

THE COURT: I am trying to define what is contended to be the illegal criminal venture; that they were attempting to rip off Balasz and Carroll by taking their money for the sale of a gun and ammunition and keeping both the money and the gun. That would be larceny.

MR. WORKS: I don't think that was the contention here. I thought the contention was the sale of a gun was the criminal activity.

THE COURT: I don't think it is. As I understand the law, this gun turned out not to be as represented. It was originally referred to in the discussion, according to the government's evidence, that it was referred to as a machine gun, but when these fellow s got back to the office, they found, as I guess anybody would know that this weapon is not a machine gun, it is merely a semi-automatic weapon, which I gather any of us could possess lawfully in the State of New York anyway. I am not sure you could have it in the city, but I think you could have it upstate.

Am I right on that, gentlemen?

MR. CAREY: My information is that it is a legal weapon to possess absent a prior felony conviction.

THE COURT: I think you have to have a license in New York City, but upstate you could have it any way and that could be just a local ordinance.

MR. WORKS: The testimony as to rip-off as you indicated is just passive, I think.

THE COURT: All right, I will take the words out.

The second page of request 13 I am adding the words under "Second" that the defendant knowingly and willfully became and was at the time of the assault a member of the venture.

You have to be a member of it at the time the assault was committed by Young. I don't think any of you differ with that, do you?

MR. CAREY: Well, your Honor, I believe he would have to have shown some affirmative evidence of withdrawing from the venture for him not to be considered a member of the venture.

THE COURT: That, of course, is true.

MR. WORKS: There was testimony on his part that he withdrew and also --

THE COURT: You could argue that. I am not sure that that inference is warranted, but it is a valid argument tomake.

MR. WORKS: Detective Menan also testified that he did.

THE COURT: I would also tell them that in considering this theory you may rely on and consider the defendant's own testimony here to the effect that the scuffle was between Young and Balasz.

I would then follow with the standard charge about the interest of a defendant.

Then I am taking request number 11 of the government. There is no need for request number 10 and I don't want it to be given because that issue has not been tendered, which is,namely, the issue of self-defense.

I would then define direct and circumstantial evidence and tell them generally about how they determine the credibility of witnesses and that there is no duty to call cumulative witnesses or witnesses equally available to both sides and that they are not to speculate on uncalled witnesses.

I hope that this alleged bystander will turn up, but if he is not here I think any argument about how you could have brought him if he would have come would be improper and I would comment on it accordingly, if there is any discussion in summation about non-produced witnesses.

I would then tell them that the penalty is not a matter for their consideration and how they should deliberate and at that point I will suspend the instructions and take you in here and hear any additional requests to charge and any exceptions that you may have.

MR. WORKS: You were indicating, I think it was request 13, there is reference in there to a joint venture.

THE COURT: Yes.

MR. WORKS: This is tantamount to a conspiracy.

THE COURT: In substance it does, but the joint venture can be a joint venture to commit a crime under state law, such as larceny, and if in the course of doing that, say A, B and C are involved in a joint venture to commit larceny, which this would have been by the agent's testimony --

MR. WORKS: By whose testimony?

THE COURT: By the testimony of Balasz, this would have been a state crime of larceny because they took his money and kept the gun. They agreed to sell him a gun, right and they showed him the gun, they took the gun back and they began to disappear with both the gun and the money and that would be larceny on their view of the facts. I know you don't concede that, but a jury

could find --

MR. WORKS: There was no testimony to that, your Honor.

THE COURT: It is my understanding of the record.

MR. WORKS: I don't know who testified to that. Balasz didn't testify to that. He said he gave the gun back to one of the parties in the car.

THE COURT: For the purpose of working it.

He asked your man for the money back and he wouldn't give him the money and he said, I don't have your money. The witness Balasz testified that in fact Mr. Dickerson did have the money.

Now, I am not passing on the credibility of any of this, you understand, but that is their contention and if the jury so finds, the jury may find that Mr. Dickerson and Young and Sykes were party to a scheme to defraud by larceny, by trick, by giving somebody the gun --

MR. WORKS: You are permitting to be brought in by summation and charge, your Honor, a crime which the defendant is not charged with.

THE COURT: He is not charged with it. He doesn't have to be charged with it.

MR. WORKS: I think it is prejudicial because I think the jury is going to be swayed by what you tell them. You tell them about a conspiracy or something, they are going to consider that and they are not supposed to consider that because that is a separate crime which the defendant is not charged with.

THE COURT: Please, perhaps I didn't finish thesyllogism. It is contended even by Dickerson that somebody struck Balasz and it happened to be Young.

Now, if the jury finds that at the time Young struck Balasz, if he did, that Young, Sykes and Dickerson were engaged in a state law criminal conspiracy or joint venture or undertaking to commit larceny against the two hippies, who later turned out to be agents, then the acts of Young in beating on Balasz, if he did, are the acts of Dickerson under principals of agency and that is all there is to it.

MR. WORKS: You have got to show, though, that there was a preconceived plan to commit the larceny.

THE COURT: That could be inferred on these facts. That could be inferred that they had a scheme or plan to pretend to sell a gun, get the man's $500 and not give him the gun and there is evidence here which would warrant a jury to conclude that these people acting

in concert were doing that.

The law is very clear on that and has been recently reviewed to some extent in this circuit.

All right, is there anything else you need? How long will you want to sum up?

MR. WORKS: I will need about fifteen minutes.

THE COURT: All right.

MR. CAREY: About fifteen or twenty minutes, your Honor.

THE COURT: If he takes only fifteen, you ought to be close to that.

Is there any other question or inquiry or problem that you have before we do that?

MR. CAREY: The government has none, your Honor.

THE COURT: Will you go out and make a final check on this man Graham, please, and come back in and report to us?

(Pause)

Certificate of Service

Nov 1, 1974

I certify that a copy of this brief ~~and appendix~~ has been ~~mailed to~~ personally served on the United States Attorney for the Southern District of New York.

Phyllis Gloor Bamberger